No. 81-1617

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition for certiorari filed March 1, 1982
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 79-CR-584

UNITED STATES OF AMERICA

v.

RAYMOND J. PLACE

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS

1979

Sept. 28 Rec'd papers from Southern District of Florida. Deft surrendered voluntarily on 8-28-79. Deft arraigned at Southern District of Florida. Papers on file (ir)

Nov. 1 Indictment filed.

Nov. 9 Before PLATT, J—case called—Deft & atty Jim Clark present—Deft waives reading of indictment & enters a plea of not guilty—adjd to Nov 23 at 11:30 am for motions or at 10 am to set a date for trial. Bail contd ($25,000 PRB). Local counsel to file Notice of appearance by 11-16-79.

Nov. 29 Motion to suppress evidence filed (forwarded to Chambers) and Defts Memo of Law filed supporting motion to suppress.

Dec. 27 Before Platt, J. Case called. Deft & counsel present. Hearing on Defts motion to suppress Order & Begun. Hearing concluded. Decision reserved. Briefing schedule made contingent on date of decision on Mendenhall. After having been advised of his rights by the Court & on his own behalf, Deft waives speedy trial rights. Court makes findings under T-18 USC 3161(h)(8). Bail contd.

1980

Sept. 30 By Platt, J. Order dtd 9-29-80 that on the basis of the foregoing, we deny defendant Raymond Place's Motion to suppress the evidence seized from him on August 17, 1979 filed. Copies mailed.

Nov. 14 Before Platt, J. Case called. Deft & counsel present. After having been advised of his rights by the Court & on his own behalf, Deft withdraws his plea of not guilty heretofore interposed, & enters a plea of guilty to the Indictment, reserving, on consent of the Govt, his right to appeal from denial of motion to suppress. Sentencing adjd w/o date. Bail contd.

1981

Jan. 9 Before PLATT, J.—Case called. Deft & Counsel present. Gov't present. Deft is hereby committed to the custody of the Atty. General o[r] his authorized representative for imprisonment for a term of 3 yrs. Deft is eligible for parole under T. 18, USC, 4205(b)(2). Deft is also to serve a Special Parole Term of 10 yrs. upon his release from confinement. Deft is also to pay a fine of $5,000.

Jan. 16 Notice of Appeal, filed. Copy of Notice & Docket Entries forwarded to CofA w/Form A. Attys. notified.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81-1034

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

v.

RAYMOND J. PLACE
DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1981	
Feb. 19	Record on appeal filed—original papers of district court.
Sept. 16	Judgment reversed by published signed opinion, filed (Mansfield, CJ)
Sept. 16	Concurring in a separate opinion, filed (Oakes, CJ)
Sept. 16	Dissenting in a separate opinion, filed (Kaufman, CJ)
Sept. 16	Judgment filed (and corrected copy)

Nov. 2 Appellee U.S.A. petition for rehearing with suggestion for rehearing en banc, filed (w/pfs)

Nov. 30 Order denied appellee U.S.A. petition for rehearing with suggestion for rehearing en banc filed (Filed 1:00 p.m.)

1982

Jan. 8 Mandate issued (judgment and opinion)

Relevant Portions of Trial Transcript
Direct Examination of Gerard Whitmore

[87]

By Mr. Wallance:

Q. Thank you.

Would you please continue.

A. Yes, sir.

After receiving the defendant's Place's ID and ticket receipt, he made a statement to me, why were we stopping him; that, again, he was traveling in his right name.

I told him I was requesting a voluntary search of his luggage because I was under the belief that he was carrying narcotics in his bags.

I told him—he asked me, could we search his bags before I could inform him of his rights.

And I told him, no, we could not search his bags [88] because the under the Fourth Amendment of the Constitution he had certain rights and we could not search his bags without a warrant, unless he permitted us and volunteered to such a search.

Mr. Place wanted to know if he was under arrest.

I informed him he was not under arrest and that he was free to leave.

He then wanted to know if he could take his luggage from the airport.

And I informed the defendant we were going to take the luggage to a neutral party, to a Federal Judge, to make a determination as to whether or not there was probable cause for a search warrant.

At this point Agent Iglesias took the driver's license provided to me by the defendant Place, and went to make a phone call that he was going to check in—

Q. One moment.

In returning to your conversation with the defendant, did you discuss whether or not the defendant could accompany the suitcases?

A. Yes, sir, I did.

Q. What exactly did you say to the defendant?

A. He wanted to know if we could take his luggage.

[89] And I said, "No, we would not open it or search it. We would bring it to a Federal Judge and he would make the determination of whether we could search it or not. If he would not grant us a search warrant, we would return it to Mr. Place, and on the condition we would in no circumstances, under no circumstances violate his rights and search him or his luggage.

I told him he was free to accompany us to go to a Federal Judge.

And the defendant Place told us he had no time, that he had pressing engagements, and he could not accompany us with the suitcases.

Q. Agent Whitmore, at that point did you believe there were narcotics in that suitcase, in those suitcases?

A. Yes, sir.

Q. What was the basis of the belief?

A. First that the defendant had attracted himself to the attention of the police officers in Miami, Florida and he had, as Detective McGavock told me, when interviewed, broken into a cold sweat and kind of stuttered in his speech; that when he came off the airport under my direct observation I observed that he was coming off with another male, apparently, or [90] engaged in conversation, while trying to look about the airport and keep up with this male; that his constant walking down the corridor with his other person, he constantly looked behind himself, appeared to be with this other person, and tried to keep up with him, while the other person was maintaining a constant walking pace. And while he walked with

the other passengers from the National flight, he did not follow the passengers down to the baggage claim area. While all the passengers were coming down the escalator, the normal route from National, the defendant Place had somehow gone down to TWA and come back a different route.

And while he was approaching the National baggage area, he was looking behind himself for no apparent reason. And before he entered the baggage claim area, he stood outside and kept looking about the area. And after he entered the area he was constantly scanning the area again. And after picking up his luggage, the two pieces, before immediately proceeding out, he stood there, looked about, and then came out.

And while he was walking to the TWA area, that he had stopped on at least two occasions, once stopping dead in his tracks, turning around looking at me, and [91] the second time when he was turning the corner.

I found in my mind that these were not the actions of an innocent person.

Q. Thank you.

Would you please continue describing your observations at the airport.

A. I recall Agent Iglesias had just come back from the NCIC check. And I think this is where I dropped off.

Q. Returning to the point where Agent Iglesias went to make the NCIC check.

A. Yes, sir.

At that point where Agent Iglesias left, the defendant Place turned closer to me and in a low voice he asked if there was some way that we could arrange for him to leave with his luggage. And again, I explained to him the whole procedure, that in a case where an agent believes that a person is carrying narcotics, that we have to go to a

Judge who would either issue a warrant or allow the luggage to go free.

And the defendant wanted to know, isn't there anything else we can do. And I told him there was not.

Q. Did you say anything else to the defendant about his suitcases?

[92] A. My next recollection is that Agent Iglesias came back from the NCIC, and he pointed at the bags and he said, "Everything is okay." And he wanted to know, "Mr. Place, are these your pieces of luggage or aren't they your pieces of luggage?"

The defendant Place at this time looked at the luggage, looked at us, again looked down, and looked at the bigger piece and he said, "This is my piece of luggage. It has my name and address on it."

He said, "The other bag, it looks like my bag," but he said, "It doesn't have my name on it and it had my name on it in Miami."

He said, "I don't know what is going on here, but this is my piece of luggage and this is not my piece of luggage."

And I said, "Wait a minute. Is it or isn't it?"

And he said, "Wait a minute. I am not saying it is my piece of luggage or it's not my piece of luggage."

At which time Agent Iglesias and I kind of stymied as to whether it was or it wasn't. And I asked him again, "Do you know the combination to these bags?"

At which time the defendant Place said, "Yes, I know the combinations, but why do you need to know them?"

And I explained to him if we were granted a [93] search warrant that we wanted to open his bag without damaging the locks. And I told him under no circumstances would we open the bags unless we had a search warrant.

The defendant Place stated tht he would not provide us with the combinations and that he was going to call his lawyer about this matter.

Q. At that point what happened?

A. At that point I picked up the bags—I'm sorry, Agent Iglesias picked up the bags, and I on a piece of paper told Mr. Place, "This is my name, this is my office telephone number and this is a 24 emergency, 24 hour emergency telephone number where I can be reached by your attorney or yourself to pick up this luggage."

Mr. Place had not given me any address where he would be going except for the driver's license. He said he would contact me or his attorney would contact me about picking up the luggage.

Agent Iglesias walking outside when Mr. Place, in a loud voice, ran after him and began, "You, I want your name. I want your badge number. I want to know who you are."

Agent Iglesias, having the bags in each one of [94] his hands informed the defendant first not to yell at him, take his hands out of his, Agent Iglesias' face, and then Agent Iglesias gave him his name and told him he could reach him at the same telephone numbers I had given him.

Agent Iglesias told me he was going to check the National baggage claim area for the other identification stub which was missing from the small bag. And I went out to my government car, which was parked across the street, and began to place the bags in the trunk of the vehicle. I could only place one bag in the trunk. While I was maneuvering, the defendant Place came over to me and he had asked me, "Can't we fix things up that I can leave with my luggage at this point?"

And I told him that there was no way, that these bags would have to be taken to the District Court and we were going to apply for a search warrant.

A few minutes later Agent Iglesias came back and we departed LaGuardia Airport.

Q. Agent Whitmore, I show you what has been marked for identification as Government's Exhibit 3 and 4.

(Handed to the witness.)

[95] Q. Do you recognize these exhibits?

A. Yes, sir, I do.

Q. How are you able to recognize them? Step down if you have to.

(The witness steps down from the witness stand.)

A. The smaller bag has an evidence sticker on it.

Q. This is the exhibit marked what?

A. Governent's Exhibit 3, which has my signature, Agent Sears' signature, the date 8-20-79, at which time we had opened the bag up pursuant to a search warrant.

The bag marked D—

Q. I'm sorry, the exhibit marked what?

A. Government's 4 is the same bag with the name Place on it, with the 1865 South Ocean, Hallandale, Florida.

Q. Are both exhibits in the same condition as they were at the time you took them from the defendant:

A. Yes, sir.

They appear to be the same except for the evidence sticker.

MR. WALLANCE: I offer Exhibits 3 and 4

[96] MR. CLARK: No objection, your honor.

THE CLERK: Government's Exhibit 3 and 4, suitcases, marked in evidence for the hearing.

Q. Agent Whitmore, with regard to Exhibit 3, the smaller suitcase, is this the classic identification tag that was on the suitcase at the time that you took it from the defendant?

A. Yes, sir, it is.

Q. And at that time there was no address label on the bag?

A. No, sir, there was not.

Q. Thank you.

Would you please continue from the point where you left the airport.

A. Yes, sir.

Agent Iglesias and I got into the Government car and we proceeded to Kennedy Airport, to the dog handler's office at the mail facility.

Q. Pardon me.

At approximately what time did you leave LaGuardia Airport?

A. It was approximately ten after four.

Q. Continue, please.

A. And we proceeded to the Customs dog handler's [97] location at the mail facility. We arrived there approximately 35 minutes later due to the heavy traffic that afternoon. It was, as I recall, a Friday afternoon.

And when we got to that location the dog handler was not there, but the dog was there.

We then made some telephone calls and got the dog handler dispatched to our location. A dog handler by the name of Donald Hughes (phonetic spelling) appeared at the scene.

I explained to him what the situation was and that we wanted the dog to—wanted these bags to be passed before the dog to find out whether there was an indication of a controlled substance inside the bags.

Q. Do you know the name of the dog?

A. Yes, sir, I do. The dog's name is Honey.

Q. Are you familiar with Honey's prior reputation for detecting narcotics inside of suitcases?

Q. Yes, sir. I used Honey myself in the past and it has a very successful rate of finding substances at the mail facility at Kennedy Airport.

Q. Please explain how the suitcases were submitted to Honey.

A. Yes, sir.

[98] The bags were submitted one at a time to the dog in the presence of 20 or 30 parcels, the dog not being able to differentiate between shape and size and texture of what is presented to it, only by the scent, and this is my understanding.

When the small bag appeared in the presence with other luggage, the dog walked up and down in front of the bag. And I was informed then by the dog handler that reaction to the suitcase was positive.

The larger suitcase was presented with the parcels and the dog walked up and down, and I was informed by the dog handler that the reaction was neither—was not a positive reaction, but yet he couldn't term it a negative reaction because the dog had given some sort of reaction which he explained to me is possible contamination through handling possibly from someone who handled narcotics.

Q. When you say the dog's reaction was positive to the smaller suitcase, what does that indicate?

A. It indicates there was a positive reaction for the presence of a controlled substance within that suitcase, as I understand it.

Q. At approximately what time did the dog react to the suitcase marked Government's Exhibit [99] number 3?

A. As I recall, it was about 5:30 or 5:40 in the evening.

Q. Were the suitcases opened during this procedure?

A. No, sir, not at all.

Q. Were they tampered with in any way?

A. No sir, not at all.

[100] Q. And what did you do after that?

A. Immediately upon learning from the dog handler that there was a positive reaction from the small suitcase, I contacted the U.S. Attorney's Office here and asked

them which method they wanted me to proceed on, and they told me to come in on Monday and apply for a search warrant.

Q. Continue, please.

A. Agent Iglesias and I secured the two pieces of luggage in our office. And on Monday morning Agent Iglesias came to the Eastern District and applied for a search warrant. It was granted later that afternoon for the small bag only.

Q. By which you mean the suitcase marked as Government's Exhibit 3?

A. Yes, sir.

Q. Continue.

A. A search warrant was granted by Magistrate Caden for the smaller suitcase. And I was informed then by Agent Iglesias—of that by Agent Iglesias on the telephone. And I opened the small bag then at the airport in the presence of Agent Sears and Agent Quick, Donald Aaron Quick.

When I opened the bags I put on some plastic [101] gloves because we were trying not to touch this and gather whatever fingerprints we could in the case. I extracted the exhibits, a large bag of narcotics, a small bag of narcotics, a small bag of marijuana, and inside a chapstick type of a lip, whatever you call it, lip moisturizer, we took that apart and found a small vial of green tabs, which the lab revealed was LSD.

Q. And you are familiar with the report of the laboratory regarding the items found in the suitcases?

A. Yes, sir.

Q. And what did that report indicate?

A. The report as I recall indicated that the bags of cocaine, one was approximately a little more than a kilo and one, as I recall, was about an eighth of a kilo, which is 250 grams—125 grams, I'm sorry. It was approximately

between what I recall as 60 and 80 percent cocaine; and that the vegetable matter field tested positively for marijuana and was, in fact, marijuana. The tabs found in that chapstick lip moisturizer were taken apart and the vial found in there I think had 20 or 25 LSD tabs.

* * * * *

[125]

Cross-Examination of Gerard Whitmore
By Mr. Clark:

Q. When did you first make personal contact with the defendant?

A. After he came back from the telephone conversations he had. He went over to his bags and he stood there and he was walking over outside. And I indicated to Agent Iglesias that he was going to interview him at this time. And I proceeded to walk over to the defendant Place with my credentials, identifying myself as a Federal narcotics officer.

[126] Q. Wasn't the true cause for this particular interview to see if consent could be obtained to look at these two suitcases?

A. One of the reasons was to see—to find out what his reason was for the way he reacted.

Q. Isn't it true that the reason you made this particular interview is because you wanted the defendant to consent to the search of his two suitcases?

A. At which point are you speaking about?

Q. I am speaking about when you first talked to him before then. Didn't you want him to consent for you to be able to look at those two suitcases?

A. I would have to answer that the initial stop was not to search the bag.

Q. All right.

What was the first question you asked him?

A. Well, after the episode where he started, "I knew you guys were cops, and I spotted him," and pointing to Agent Iglesias—

Q. What was the first question you asked him?

A. The first question asked was asked by Agent Iglesias as to whether the luggage was his.

Q. And he said yes; isn't that correct?

A. Yes, sir.

[127] Q. And what was the next question that either you or Agent Iglesias asked him?

A. I recall the next thing being the request for identification and airline ticket.

Q. So, although the purpose of the interview was to have him explain his suspicious activity, at least suspicious in your mind, that was not the initial question, was it? You asked him what his name was and to produce identification, and you already knew that, didn't you?

A. He could have given me another different name.

Q. You asked him if these bags were his?

A. Yes.

Q. And he said yes.

When was the first question, if any, you ever asked him as far as explaining his scanning the area? You didn't ask him why he was scanning the area, did you?

A. No, sir.

Q. But that was why you were going to interview him; isn't that right?

A. Yes, sir, that's correct.

Q. Now, eventually you seized these two bags from his possession; isn't that right?

[128] A. We took the bags to apply for a search warrant.

Q. Did you have a problem with me using the word "seize" as opposed to "took"?

A. In my mind a seizure is under Government control. And a seizure in my mind would have been, would be where the contents of the suitcases would not be returned to him.

Q. After you took these two bags or seized them, they were in Government control, weren't they?

A. Yes, sir.

Q. So it fits your definition of seizing them, doesn't it?

A. Yes. But a Judge could have told us to return it to him and they would have been returned.

Q. But that's pure speculation at that time, wasn't it?

A. It was speculative, but he was free to find out as to whether we were going to a Judge or, in fact, if the Judge would give him back his property.

Q. When you seized these two bags, you did not have a warrant, did you?

A. No, sir, I did not.

Q. When you seized these two bags you did not [129] make a voiced formal arrest of him, did you?

A. No, sir.

Q. And when you seized these two bags, the defendant did not consent to that seizure, did he?

A. The answer is—

Q. He couldn't do anything about it, could he?

A. He could have come with us.

Q. You were going to take the bags, regardless of whether he came with you or not; isn't that correct?

A. At one point, after the statements were made, I felt that there were narcotics in the suitcase—

Q. The time you seized the bags you were going to take the bags whether he came with you or not; isn't that correct?

A. Yes, sir.

Q. Now, after the two bags were taken into the possession, custody and control of you and Agent Iglesias, they were then transported to where?

A. To JFK Airport.

Q. Okay.

And was it at that point in time where a dog handler was attempted to be contacted and notified?

A. Yes, sir.

Q. And it's at that point in time that the dog [130] was available but the handler was not?

A. Yes, sir.

Q. Where were the bags located when the dog and the handler eventually made the inspection or sniff?

A. The dogs were brought into a Customs examination area within the U.S. mail facility at JFK International Airport. And they were placed on a conveyor belt along with other parcels, one bag at a time.

Q. That's the second time you used the word "parcels." Isn't it true you were within a mail area and these were the only two suitcases and, indeed, the other items were parcels?

A. Yes, that's a fact.

Q. So there was something distinguishing these two bags from every other item on the conveyor belt; is that right?

A. Yes. As I said this morning, those dogs are trained to smell, attracted by the smell and not sight or appearance. Because all the parcels are wrapped differently, some in paper and some in burlap, and they all appeared differently to the dogs, so they only rely on the sense of smell.

Q. You know that to be a fact?

[131] A. That's what the dog handler informed me.

Q. Did you smell anything on these two bags?

A. Did I smell anything? I didn't attempt to and they didn't smell to me, no, sir.

Q. As I recall, these bags were sniffed one at a time; is that correct?

A. Yes, sir.

Q. And isn't it a fact that after the first bag was sniffed, it was removed and the second bag was placed in the same place that it was located?

A. I don't know if it was the same place, but placed in a place with the parcels.

Q. Wouldn't you agree with me that when you go on a trip you expect your suitcase to continue with you until the—from the time you leave your port of origin until the time you return to your port of origin?

A. Yes, sir.

Q. Would you agree with me that when traveling the items contained in your suitcases are very personal items?

A. They are my personal property.

Q. That's correct.

And isn't it also correct where this particular sniff was conducted, the area was not open to the public?

[132] A. That's correct.

Q. Now, after receiving the reactions from the dog Honey, the next step then seeking to look into these bags was to apply for a search warrant; is that not correct?

A. That's right.

Q. Did you participate in drafting the documents necessary to apply for a search warrant?

A. No, sir. Agent Iglesias was the one who appeared here on the following Monday morning, I believe it was the 20th of August, and made that application.

Q. Have you, since that time, had an opportunity to review the affidavit for a search warrant prepared by and signed by Agent Iglesias?

A. No, sir, I did not.

Q. But you were aware in the affidavit for a search warrant there was an attempt made to have a search warrant issued that went to both of the suitcases; is that not correct?

A. Yes, sir.

Q. And up until the point that the dog Honey came into the picture, everything that you could say as a

Government agent concerning these two bags identically were suited to each bag? In other words, there [133] was no difference factually or whatever in any way to distinguish the facts you were equipped with with respect to these two bags?

Do you understand the question?

A. I understand the question.

Q. In other words, if Mr. Place was nervous as to this bag, he was also nervous as to this bag; is that correct?

A. Yes.

Q. There was nothing that could distinguish these two bags up until the time that the dog Honey got a positive reaction on the small bag and a probable reaction on the large bag; is that not correct?

A. I would have to say it's incorrect.

Q. All right. Correct me.

A. In my original notes from Detective Robertson McGavock, it indicates that there was a different address on each of those bags. It also indicated to me that there was a difference of spelling on these two bags. One was "Place," and the other was "Palce," if I recall. One said 1865 South Ocean Drive, and the other said 1885 South Ocean Drive. And that Detective McGavock ran a telephone check with a place—with a phone left with National Airlines, and it came back at [134] one of the addresses and not the other address, and that there was no listing of Mr. Place at that address.

Q. Based on all of that information, did you have in your own mind any suspicion that one of these bags had narcotics and the other one did not?

A. When I asked a question—do you want me to answer it?

Q. You couldn't tell which, if any, had narcotic substance in them, could you?

A. No.

Q. So up until the time that Honey made the sniff of the two bags, you, based on the information that you had, could not make a determination as to which, if either of these two bags, had narcotic contraband contained in them; is that correct?

A. Yes, sir.

Q. So drawing back again to the application for the search warrant, but for the different reaction of the dog Honey, these bags were considered as one, one group of two bags; is that correct?

A. Yes, sir.

Q. Wouldn't you agree with me that the fact that the U.S. Magistrate who authorized the issuance of this search warrant based his determination of the [134] existence of the right to make that search on the sniff and the sniff alone, as taking you above the line for probable cause?

MR. WALLANCE: Objection, your Honor.

THE COURT: I will allow that.

A. I would say that's a question that was in the mind of Magistrate John Caden, and you may properly direct it to him, that question.

Q. I will direct it to you, though.

A. I don't know what was in his mind when he signed it.

Q. We know based on the entire case that there was nothing different between these bags, from the time you first observed it and based upon all the information related to you by Detective McGavock, there was absolutely nothing to distinguish the two, insofar as telling which one, if either, had contraband in it except that the dog had a possible reaction as to one and a probable reaction on the

other, and as to the probable reaction, the Magistrate denied the warrant; isn't that true?

MR. WALLANCE: I object, your Honor.

THE COURT: That's a fact, isn't it?

THE WITNESS: Yes, sir, it is a fact.

SUPREME COURT OF THE UNITED STATES

No. 81-1617

UNITED STATES,

PETITIONER

v.

RAYMOND J. PLACE

ORDER ALLOWING CERTIORARI. Filed June 7, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

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